

SCOLT HEAD AND DISTRICT COMMON

RIGHTHOLDERS ASSOCIATION

Back in 1996 SH&DCRA put together a document called “**Some Points of Law Relating to Common Land**”. Since the 2006 Commons Act there have been a few changes which are mentioned here. The overriding authority to answer these questions of law is Gadsden on Commons and Greens – E F Cousins and R Honey – Sweet and Maxwell – 2012, but there are others and some of these are mentioned here.

Questions often asked concern common rightholders as the **Legal Occupiers** of the common land and SH&DCRA as the **Competent Authority** to manage the common rights. Other questions asked are about the nature of common rights, how can they be used and how these rights affect the landowners?

Rights in gross:

The most important thing to remember when discussing the common rights, over CL65 and CL124 in particular, is that **the rights are held in gross**. This means that the rights are **personal property**; can be bought and sold, or leased to another and handed down in a last will and testament. You should note that these rights are **not limited in quantity** apart from some grazing rights.

What are the common rights? Your common right appears in the Register held by the Registration Authority, Norfolk County Council and lists those things that you are entitled to take from the commons CL65 and CL124. For most it is: *herbage* (grazing), *estovers* (timber, firewood, bracken and rushes), *samphire*, *soil*, *fish*, *shellfish*, *bait* and *wildfowl at all times*.

What about the rights of the landowner? Generally, as confirmed by the Registration Authority recently, the landowner is entitled to take any surplus products after all the rights are exercised. **However**, can there be a surplus for the landowner where the rights are in gross and not limited in quantity? Gadsden (p 224 & 225) quotes a judgement that says the landowner can only take a surplus when it is *ascertained that there is more common than is necessary for ... the commoners*.

Can a common right be lost through non-use? No is the answer; as Gadsden says (5-02, pp 224 & 5) *...if in the event that the commoner subsequently exercises his rights in full, then the Lord [landowner] must defer as the rights held by the commoner will not have been lost by mere non-user*.

Ancillary Easements. Your right of common also includes *all easements which are reasonably necessary for the enjoyment of the primary right*. Gadsden (6-03 p 259.) The primary rights over the commons CL65 and CL124 are seen above.

Strangers on the common! The only rights that those other than commoners and landowners have on the commons is for *air and exercise*. Gadsden (PP 266 & 267) refers to non-common rightholders as *strangers* and outlines the actions that can be taken against them by the commoners. *A commoner may bring an action not only for unlawful consumption, taking away or destruction of the herbage (or indeed any other product for which he has a right) but also anything which if not stopped could grow into a legal right to the prejudice of the commoners.*

Abatement against strangers. Gadsden (PP267 &268) “*...under suitable circumstances the courts have upheld the right of abatement on common land*. Where in one case the Parish Council gained a conviction against common rightholders for malicious damage by pulling down a sign on the common, the Court of Appeal quashed the convictions; *as the notice, on these facts, was unlawful, having nothing whatsoever to do with the management and regulation of the common...*

What is the role of Natural England on the commons?

<https://designatedsites.naturalengland.org.uk/SiteDetail.aspx?SiteCode=S1001342&SiteName=&countyCode=29&responsiblePerson=&SeaArea=&IFCAArea>

To quote from NE: *The overarching management policy for Scolt Head Island NNR is to achieve and maintain favourable condition for the features of the North Norfolk Coast SSSI, SAC, SPA and Ramsar Site and the features of the Wash & North Norfolk Coast European Marine Site within the context of natural change but also to maintain Scolt Head as a wild, open and remote landscape where natural processes operate freely and to provide the added biodiversity value expected from a National Nature Reserve.*

To quote from NE; *...our purpose is to help conserve, enhance and manage the natural environment for the benefit of present and future generations...*

How can NE carry out its purpose? To quote again; *Natural England is responsible for enforcing laws that protect wildlife and the natural environment. Natural England aims to use enforcement: as a last resort but it is sometimes necessary to make sure that the natural environment is protected.*

SH&DCRA have a duty to ensure that NE actually do what they are supposed to do to protect the commons.

What is the role of the National Trust on the commons? The NT owns large parts of CL65 and CL124 (there are also some disputed ownership areas). Basically, the NT is bound by the NT Acts of Parliament which protect the rights of the common rightholders. Gadsden (PP 357 – 361)

At the moment SH&DCRA are attempting to forge good relations with the NT.

The following law, authorities and the government support the role of the Association in managing the commons and acting as the Legal Occupiers.

The Wash and North Norfolk Marine Partnership

“The following are administered by Scolt Head and District Common Right Holders’ Association. Mostly falling inside the parishes of Brancaster and Burnham Overy Staithe, comprising land mostly owned by the National Trust, and areas of the Scolt Head NNR.

CL 65, CL 124, CL 161, CL 162

1.2 Management Legislative Framework. The Act of Parliament is:

Conservation [Natural Habitats &c] Regulations 1994 Marine Sites in England & Wales

This Act does not grant any powers which enable existing legal rights, either of ownership or any other kind, to be rescinded or overturned. It merely states that those with such rights “have a new duty under the Habitats Regulations [Reg. 3[3]] to exercise their existing functions for the purposes of securing compliance with the Directive”. [General Principles, section 3.4].

As defined by the legislation, Common Right Holders are Competent Authorities.

They derive their powers and duties from Statute which enables them to regulate activities in the marine environment as stated under the Act.

“In addition to general management and regulatory functions, many competent authorities have statutory functions to make decisions on applications, licences and permissions as governed by statute.” [Section 3.17] The Common Right

Holders Associations regulate activities on the common by the granting of such applications, licences and permissions. Licences and permissions from the Scolt Head and District Common Right Holders Association have, for instance, been requested by, and granted to, the National Trust, Natural England and other organisations with regard to activities carried out on the common.

<https://wnnmp.co.uk/wp-content/uploads/sites/29/2017/07/EMS-Managed-Activities.pdf>

The Modern Law by Angela Sydenham (Lime Legal 2006) at 6.9 Public Order (page 107).

She is outlining from the 2006 Act.

"Trespass is trespass against the occupier of the land, or those with rights of common. Occupier is defined as; 'the person entitled to the land by virtue of an estate or interest held by him' and includes commoners and the local authority."
The Criminal Justice and Public Order Act 1994.

(Page 66) "This power (of the owner) is subject to the overriding principles that there must not be a substantial interference with the rights of commoners."

(Page 2) ...rights in gross are incorporeal assets private property in other words.

Defra - A Common Purpose - *Those with a legal interest* e.g. landowner (often called the 'owner of the soil' on common land), *commoners* (those who own or occupy the land to which rights of common are shown as attached in the register,)

Government Guidance: Commons associations

Commoners and landowners can also set up voluntary groups called commons associations.

Commons associations usually have no legal power and rely on their members to agree about how the common should be managed.

They can sign legally binding agreement or guarantees, like an agri-environment agreement, if all members agree.

The agreement or guarantee can set out how members must treat the common.

<https://www.gov.uk/guidance/managing-common-land#how-commoners-and-landowners-can-manage-commons>

RWC 16.2.21.